Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. _____

THE SUPREME COURT OF THE UNITED STATES

_____ Term, _____ 2000

JOHNNIE EDWARD SANDERS,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

On Petition for Writ of Certiorari
To the United States Court of Appeals for the Ninth District

Petition for Writ of Certiorari

Johnnie Edward Sanders, petitioner, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled case on July 19, 2000.

Harold M. Provizer
Counsel of Record for Petitioner
Ray Jurado, Asst U. S. Attorney
Counsel of Record for Respondent

33pp

INTRODUCTION

Johnnie Sanders dropped off lisha Brown at the Ontario International Airport on July 9, 1997. Brown stood in the Skycap line conversing with mutual acquaintance, Amy Colvin. Colvin realized she forgot her airline ticket. The Skycap attendant told Colvin about a later flight, Colvin exited the line, went to hail a taxi, but flagged down Sanders, who had not yet left the airport. Exiting the airport, Sanders was stopped in his vehicle by law enforcement officers, whose suspicion was aroused because 1) Colvin's use of overstuffed, padlocked bags, 2) Colvin's apparent scanning of surrounding area for surveillance and use of a cell phone, 3) Colvin's appearance to be pretending not to know Brown, with whom she had been conversing, and 4) Colvin's leaving without entering the airport although officers overheard Colvin tell the Skycap attendant she forgot her airline ticket. Officers pulled Sanders over, mentioned no traffic infraction, and asked to search the vehicle. Sanders denied the request and was detained at gunpoint as a canine sniff test was arranged. The dog alerted to drugs in the luggage, Sanders was arrested.

QUESTION PRESENTED FOR REVIEW

1. Whether the Ninth Circuit District Court properly found the existence of reasonable suspicion for a non-consensual vehicle detention at an airport as required under the 4th Amendment where law enforcement officers relied on the following factors: 1) the use of overstuffed, padlocked bags, 2) suspects' apparent scanning of surrounding area for surveillance and use of a cell phone, 3) suspect's appearance to be pretending not to know people with whom they had been conversing, 4) suspects' leaving without having entered the airport although officers heard Colvin tell the Skycap attendant that she forgot her airline ticket?

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OPINIONS BELOW

The July 19, 2000, opinion of the Court of Appeals, the judgment of which is sought in this petition to be reviewed, is an unpublished decision, Case No. 98-50123, decided on July 19, 2000, and is reprinted in the separate Appendix to this petition on pp. 22. There was no opinion of the United States District Court for the Central District of California in the lower court proceeding, with the exception of the exclusion hearing to exclude the fruits of an illegal search, because Mr. Sanders entered into a plea agreement with the United States Attorney in open court in D.C. No. CR-97-00022-RT-1.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on July 19, 2000. The jurisdiction of this Court is invoked pursuant to 28 U.S.C.A. § 1254 (1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES, AND REGULATIONS INVOLVED

1. *The 4th amendment, United States Constitution, which provides:*

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized..

2. The statutes under which Petitioner was prosecuted, though nothing turns on its terms, were 21 U.S.C. § 841 (a) (1), and 18 U.S.C. § 924 (c), which provided as follows:

21 U.S.C. § 841 (a) (1). Unlawful Acts:

Except as authorized by this subchapter, it shall be unlawful for any person to knowingly or intentionally to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.

18 U.S.C. § 924 (c). Penalties:

Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime . . . for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking – be sentenced to a term of imprisonment of not less than 5 years.

STATEMENT OF THE CASE

The facts necessary to place in their setting the questions now raised can be briefly stated:

A. *Course of proceedings in the 21 U.S.C. § 841 (a) (1) and 18 U.S.C. § 924 (c) case now before this Court.*

Following the denial of his motion to suppress by the District

Court, Mr. Sanders pleaded guilty conditionally to violations of 21 U.S.C.§ 841 (a) (1), and 18 U.S.C. § 924 (c). The court sentenced him to 211 months imprisonment. On appeal the Ninth Circuit affirmed the existence of reasonable suspicion and upheld the search on July 19, 2000, in an unpublished decision, Case No. 98-50123.

B. *Relevant facts concerning the underlying conviction for violation of 21 U.S.C. § 841 (a) (1), and 18 U.S.C. § 924 (c) and possible violation of 4th Amendment rights.*

On July 9, 1997, Appellant, Johnnie Sanders, drove into Ontario International Airport in a Mitsubishi Montero. Iisha Brown who he dropped off at the Continental Airlines Skycap along with three suitcases accompanied him. These suitcases, two floral and one black, were placed in the Continental skycap line by another male who hugged and kissed Brown and departed with Mr. Sanders. Drug Enforcement Administration agents along with airport security personnel observed this event. Soon thereafter, Amy Colvin, along with a black male pulled along curbside in a small black car. Agents observed the male take two floral suitcases from the car and place

them in the Continental skycap line. After dropping off Colvin, the male left the area.

Agents observed Brown and Colvin conversing in a friendly manner. One agent observed Colvin pointing in the direction of another plain clothed agent who was talking into a hand-held radio. Agents also observed a black male in the airport parking lot across the street turn and leave after Colvin waved goodbye. Agents then observed Colvin getting out of the skycap line and overheard her conversation with the attendant asking for a later flight because she had forgotten her ticket. One agent also allegedly observed Colvin make a cellular telephone call. At this point, Colvin, having realized she had forgotten her ticket, saw Sanders driving by and flagged him down.

Agents then observed Johnnie Sanders arrive at curbside in a Montero and pick up Colvin and her luggage. The luggage was placed in the rear trunk area of the vehicle. This was the only activity involving Mr. Sanders observed by agents. Sergeant Eric Hopely, an agent on the scene, then ordered a traffic stop of the Montero for the

sole purpose of investigating narcotics activity. Sergeant Hopely based the decision to conduct the stop exclusively on the following factors: 1. Colvin appeared to be traveling with new suitcase with locks. 2. Colvin used a cellular telephone. 3. Colvin pointed in the direction of a plain clothed agent and looked about the area.. 4. Colvin and Brown engaged in friendly conversation. 5. Sanders happened to be the individual who picked up Colvin.

In reaching its decision that reasonable suspicion existed in the present case, the Ninth Circuit relied on the following factors: 1) the use of overstuffed, padlocked bags, 2) suspects' apparent scanning of surrounding area for surveillance and use of a cell phone, 3) suspect's appearance to be pretending not to know people with whom they had been conversing, 4) suspects' leaving without having entered the airport (the Ninth Circuit ignored the fact that officers heard Colvin tell Skycap attendant that she forgot her airline ticket).

REASONS FOR GRANTING THE WRIT

The judgment of the United States Court of Appeals for the Ninth Circuit should be reviewed by this Court because the following factors relied on by law enforcement agents for their determination that reasonable suspicion existed to stop Sanders, 1) the use of overstuffed, padlocked bags, 2) suspects' apparent scanning of surrounding area for surveillance and use of a cell phone, 3) suspect's appearance to be pretending not to know people with whom they had been conversing, 4) suspects' leaving without having entered the airport although officers heard Colvin tell the Skycap attendant that she forgot her airline ticket, were insufficient, and amounted to nothing more than an inchoate and unparticularized hunch. These type of bland and innocuous factors allow police too broad a net at airports, which will necessarily result in the detention and search of countless numbers of innocent travelers who daily exhibit exactly the same conduct that lead to the stop, arrest, search and conviction of Mr. Sanders.

I. THE 4th AMENDMENT PROHIBITION AGAINST STOPPING A VEHICLE WITHOUT REASONABLE OR FOUNDED SUSPICION WAS VIOLATED EVEN WHEN TAKING INTO ACCOUNT THE COLLECTIVE KNOWLEDGE OF THE AGENTS EFFECTUATING THE STOP.

A. Standard of Review

As a general matter determinations of reasonable suspicion and probable cause should be reviewed *de novo* on appeal. Ornelas V. United States (1996) 116 S. Ct. 1657, 1663.

B. Given The Innocuous Nature of The Conduct Relied upon by Agents Effectuating the Stop, the Requisite Reasonable Suspicion Necessitated by Law Was Not Present

In Florida v. Royer (1983) 103 S. Ct. 1319, this Court affirmed the Florida District Court of Appeal's conclusion that Royer was being illegally detained when he consented to the search of his luggage where the facts which the officer's relied on were that Royer 1) was nervous, 2) was young, 3) was carrying two apparently heavy

American Tourister bags, 4) had paid cash for an airline ticket, and 5) had purchased the ticket under an assumed name. Id. at 1329. In finding a lack of probable cause this Court noted that if such criteria alone were sufficient to justify a search, then "every young man paying cash for a ticket to New York City under an assumed name and carrying two heavy American Tourister bags may be arrested and held to answer for a serious felony charge." Id.

This Court also noted that under Terry v. Ohio (1968) 392 U.S. 1,

> detentions may be "investigative" yet violative of the Fourth Amendment absent probable cause. In the name of investigating a person who is no more than suspected of criminal activity, the police may not carry out a full search of the person or of his automobile or other effects. Nor may the police seek to verify their suspicions by means that approach the conditions of arrest. Dunaway v. New York (1979) 442 U.S. 200.

Royer makes it profoundly clear that the Ninth Circuit sanctioned police conduct which was violative of the 4th Amendment. The suspicious conduct was nothing more than stuffed, locked suitcases, apparent counter-surveillance head movements, and an abrupt departure from the airport that officers overheard the suspect tell the Skycap attendant was due to a forgotten airline ticket. Royer doesn't prohibit the consensual encounter for investigative purposes, but does prohibit " verify[ing] their suspicions by means that approach the conditions of arrest." The conditions approaching arrest were certainly present when officers pulled Sanders over, and detained him at gunpoint over his explicit objection. The officers needed probable cause at that point that they did not have. The only way to get probable cause was to violate Sanders' 4th Amendment rights against unreasonable searches and seizures.

In Reid v. Georgia (1980) 100 S. Ct. 2752, this Court, in vacating the judgment of the Court of Appeals of Georgia, found that a government agent could not, as a matter of law, have reasonably suspected the petitioner of criminal activity where the agent relied on

the following drug courier profile characteristics: 1) the petitioner had arrived from Fort Lauderdale, a principal place of origin of cocaine later sold elsewhere in the country, 2) the petitioner arrived in the early morning, when law enforcement activity is diminished, 3) the petitioner and his companion appeared to the agent to be trying to conceal the fact that they were traveling together, and 4) they apparently had no luggage other than their shoulder bags. Id. at 2754. This Court specifically reasoned that only the fact that the petitioner preceded another person and occasionally looked back at him related to their particular conduct, and that the agent's belief that the petitioner and his companion were attempting to conceal the fact that they were traveling together was more an "inchoate and unparticularized suspicion or hunch, " than a fair inference in the light of his experience. Id.

The factors relied on by the Ninth Circuit in the present case similarly amount to no more than an "inchoate and unparticularized suspicion or hunch," as opposed to a fair inference in the light of the officer's experience. If the use of overstuffed, padlocked bags is

sufficient to justify a stop, then vast numbers of innocent travelers could be subjected to detention while at an airport. The agents' observation of the suspects' apparent scanning of surrounding area for surveillance and use of a cell phone is also inchoate and unparticularized, as they could have been looking for traveling companions, for shorter lines to wait in for luggage check, for monitors with departure information, or just simple "people watching."

As this Court found the fact that the suspects' conduct in Reid, which appeared to the agents to be trying to conceal that they were traveling together, to be an inchoate and unparticularized hunch, this factor relied on in the present case is also an inchoate and unparticularized hunch. The officers were interpreting lawful, ordinary, and ambiguous conduct as indicative of criminal activity. In other words, they had a hunch.

The fact that the suspects' left the airport without having actually entered the airport, considered in light of the fact that the law enforcement agent overheard the female suspect say to the

skycap attendant that she forgot her ticket and would need to take a later flight, also amounts to nothing more than an inchoate and unparticularized hunch.

None of the most common "courier profile" characteristics are present. The law enforcement agents did not observe one-way tickets purchased with cash, or a discrepancy between identification and the name on the ticket. There is no suggestion that the suspects were overly nervous while being questioned. There is nothing particularized about the officer's observations. It was all based on a hunch.

In United States v. Arvizu (2000) 217 F.3d 1224, the Ninth Circuit reversed the district court's finding that reasonable suspicion existed based on the following factors: 1) smugglers used the road in question to avoid the border patrol station; 2) Arvizu drove by within an hour of a Border Patrol shift change; 3) a minivan stopped on the same road a month earlier contained drugs; 4) minivans are among the types of vehicles commonly used by smugglers; 5) the minivan slowed as it approached the Border Patrol vehicle; 6) Arvizu

appeared rigid and stiff, and did not acknowledge the officer; 7) the officer did not recognize the minivan as a local car; 8) the children's knees were raised, as if their feet were resting on something on the floor of the van; 9) the children waved for several minutes but not towards the officer, and 10) the van was registered to an address in a neighborhood notorious for smuggling. Id. at 1230.

Essentially, while certain factors associated with a drug courier were present, such as the route Arvizu was driving, the vehicle he drove, his rigid and stiff appearance suggesting nervousness, the apparently parent-contrived waving by the children while being followed by agents, and the fact that his vehicle was registered in a known source-city for drugs, the Ninth Circuit found that the factors relied on did not, even when taken together, amount to behavior that couldn't describe more common lawful conduct.

The factors in the present case, when analyzed under Arvizu, do not suggest any greater likelihood that a crime was being committed, or would be committed. People traveling in an airport may commonly be found with overstuffed, padlocked bags. People in

airports may appear nervous and looking for surveillance and use of a cell phone for such other reasons as looking for other traveling companions, looking for a shorter line to wait in to check in luggage, or looking for screens which provide departure information.

Appearing to be pretending not to know people with whom one had been conversing is also innocuous. People who travel together can also be engaged in their own private thoughts, ceasing to converse, and thus appearing to be ignoring each other. Travel companions sometimes become irritated with each other due to travel stresses and simply choose not to speak.

The fact that the suspects' in the present case left the airport without having entered the airport is indeed unusual, but it is not suggestive of drug activity. In the present case, the officer's who observed the behavior also overheard a suspect say to the skycap attendant that she forgot her ticket, and would need a later flight. As a rule, one could argue, drug couriers are aware that there are law enforcement agents at airports, which is why they go to lengths to appear like an ordinary traveler. An abrupt decision to leave the

airport after having just arrived, taken together with the officer's awareness of a justifiable reason, does not suggest criminal activity is afoot.

In U.S. v. Thomas (2000) 211 F.3d 1186, 1189, the government argued that reasonable suspicion existed based on three factors: 1) the FBI provided a sheriff with a tip notifying him that narcotics might possibly be located at the house; 2) the sheriff's observation of several people coming and going from the house; and 3) three or four thumps from the interior of the garage, which the sheriff testified sounded like the bundled marijuana being loaded into a truck.

In rejecting a finding of reasonable suspicion, the court found the FBI tip flawed because it lacked specific information regarding the particular occupants of the house, the particular vehicles involved, any particular suspicious conduct, or the type of narcotics at issue. Id. The sheriff's observation of people coming and going, which were consistent with drug activity, was found consistent with any activity. Id. at 1190. Marijuana was found not to have any

distinctive sound. Id. at 1191. Thus, while the conduct of the people coming and going at the house was consistent with drug related activity, it was consistent with legal activity too, and without a particularized suspicion based on articulable facts, reasonable suspicion did not exist.

Under Thomas, the factors relied on in the present case fail to rise to the level of particularized suspicion based on articulable facts. The officers in the present case were doing nothing more than observing the suspects looking around, talking, not talking, and leaving, and interpreting the thoughts and motives behind the observed behavior. As such, the officers failed to offer particularized suspicion based on observable facts to support their hunch. If officers are allowed to make stops based on such innocuous and subject-to-interpretation behavior, then the 4th Amendment will suffer considerable erosion such that nearly all travelers in an airport will be exhibiting behavior sufficient to justify a stop based on reasonable suspicion.

In United States v. Tovar-Valdivia (1999) 193 F.3d 1025, the

Eighth Circuit found a lack of reasonable belief that the suspect had committed or was committing an offense based on the following factors: 1) he was arriving from Los Angeles, a narcotics source-city, 2) he appeared to be in a hurry, 3) he carried a new bag, 4) and the officer saw bulges around the suspect's torso while engaged in a consensual search of the suspect's bag. Id. at 1028.

In Tovar-Valdivia, law enforcement agents made their determination of reasonable suspicion based on the appearance of the luggage and an interpretation of he suspect's behavior, among other things. There were no factors such as a discrepancy between the name on the ticket and the suspect's identification, or a ticket paid in cash, or warm bulky clothing worn in summer, or excessive nervousness when questioned by officers. Such is true in the present case as well. The suspects in the present case had stuffed suitcases and the officers observed head movements that they interpreted to be motivated by an intention to conduct counter-surveillance. The officers were not able to point to anything concretely suspicious, like a discrepancy in identification, a one-way ticket, a ticket paid for

with cash, or excessive nervousness. Without more, stuffed luggage and ambiguous head movement cannot constitute reasonable suspicion.

In United States v. Campbell (1988) 843 F.2d 41089, the Eight Circuit did find reasonable suspicion that the suspect had committed or was committing an offense based on the following factors: 1) Campbell arrived from Los Angeles, a "source" city, 2) Campbell arrived on a flight which agents had been watching because it left Los Angeles after DEA agents were off duty, 3) Campbell arrived in St. Louis at a time when the airport was uncrowded, 4) Campbell walked very quickly and did not check the arrival or departure boards, 5) Campbell looked behind him several times while walking, 6) Campbell did not pick up any checked luggage and carried no luggage other than a carry-on bag, 7) Campbell wore a winter coat in late July, 8) Campbell used a one-way ticket paid for in cash, 9) Campbell was very nervous while talking with the agent and remained nervous even after revealing his ticket and identification that revealed no discrepancies. Id. at 1094.

In reaching its decision the court emphasized the facts that Campbell wore a winter coat in July, looked over his shoulder three times, had a one-way ticket paid for in cash, and remained very nervous for no apparent reason after giving agents his identification that revealed no discrepancies.

The officers in Campbell were able to identify concrete facts which supported their suspicion, namely, a winter coat in July, the one-way ticket paid for in cash, and excessive nervousness in the face of verified identification. The officers in the present case, on the other hand, were not able to articulate such strong facts. The officers had not identified themselves to the suspects, or initiated an encounter in any manner. The officers did not say that the suspects appeared nervous, or had suspicious tickets, or were traveling to or from a source/destination city. Mere head movement, which appears to be looking for surveillance or ignoring a traveling companion, leaves too much discretion for the officers and can never be cited as a particularized and articulable fact giving rise to reasonable suspicion.

CONCLUSION

For the above reasons, the petitioner respectfully requests that his petition for a writ of certiorari be granted.

October 11, 2000

APPENDIX

A. JUDGMENT OF THE COURT OF APPEALS

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LODGED
CLERK, U.S. DISTRICT COURT
AUG 14 2000
CENTRAL DISTRICT OF CALIFORNIA
BY DEPUTY

NO. 98-50123

CT / AG#: CR-97-00022-RT-1

UNITED STATES OF AMERICA

Plaintiff – Appellee

v.

JOHNNIE EDWARD SANDERS

Defendant – Appellant

APPEAL FROM the United States District Court for the Central District of California Los Angeles.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Central District of California Los Angeles and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED.

Filed and entered July 19, 2000

A TRUE COPY
ATTEST AUG 11 2000
CATHY CATTERSON
Clerk of Court
by: s/Teresa Mitchell Bell
Deputy Clerk

Not for Publication

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JUL 19 2000

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,	*	No. 98-50123
Plaintiff-Appellee	*	D.C. No. CR-97-00022-RT-1
v.	*	
JOHNNIE EDWARD SANDERS,	*	
	*	**MEMORANDUM** *
Defendant-Appellant.	*	

Appeal from the United States District Court
For the Central District of California
Robert J. Timlin, District Judge, Presiding

Argued and Submitted December 10, 1999
Pasadena, California

Before: **B. FLETCHER, KOZINSKI** and **THOMPSON**, Circuit Judges

1. The officers had cause to stop Sanders's vehicle because of the peculiar conduct they had observed. While the use of overstuffed, padlocked bags is not itself suspicious, the actions of defendant's associates were. Innocent travelers do not usually scan their

surroundings nervously for surveillance, pretend not to know people with whom they had just been conversing, signal approaching travel companions to turn and flee with their heavy bags, and then abruptly leave without ever having entered the airport. It is possible to imagine an innocent scenario involving these actions, but they were sufficiently out of the ordinary and consistent with the officers' experience of drug traffickers to support a reasonable suspicion that Colvin was carrying contraband. See Illinois v. Wardlow, 120 S. Ct. 673, 677 (2000) (where conduct is ambiguous and susceptible of an innocent explanation, officers may detain the individuals to resolve the ambiguity) (citing Terry v. Ohio, 392 U.S. 1, 5-6 (1968); United States v. Cortez, 449 U.S. 411, 418 (1981) (the inferences drawn by trained officers from objective observations must be given weight in evaluating reasonable suspicion). Unlike the observed actions in United States v. Thomas, 211 F.3d 1186 (9th Cir. May 8, 2000), which were "not in any respect unusual," id. At 1190, the actions of Sanders's associates, particularly when taken in combination, were highly unusual.

2. Incident to the investigative stop, Detective Shaffer conducted a dog sniff of the outside of the car. Once the dog had alerted to the rear of the car, the officer had probable cause to search it and everything in it that might contain narcotics. See United States v. Ross, (456 U.S. 798 (1982). Contrary to defendant's contention, there is no exigency requirement to the "automobile exception." See Maryland v. Dyson, 527 U.S. 465 (1999). Since the officers were entitled to search the car based on the dog alert, whether Sanders was subsequently arrested or not is irrelevant.

3. After consulting with his attorney, Sanders signed a plea agreement stating that he knowingly and voluntarily waived his right to appeal his sentence. We therefore have no jurisdiction to review his sentence. See United States v. DeSantiago-Martinez, 38 F.3d 394 (9th Cir. 1992).

4. Sanders's claim that the federal drug trafficking laws are unconstitutional is without merit.

AFFIRMED.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.